Public consultation on:Tackling migrant smuggling: is the EU legislation fit for purpose?

Fields marked with * are mandatory.

*1.Are you submitting your contribution as:

- ◯ Private individual
- ◯ Academia
- ◉ Representative of a Member State
- ◯ International organisation
- ◯ Organisation
- ◯ Enterprise
- ◯ Other

Please specify if you belong to any of the categories below:

- ◯ Migration authorities
- ◯ Border management authorities
- ◯ Member of a Member State's administration responsible for asylum applications
- ◯ Consular authorities
- ◯ National police forces, penitentiary authorities, defence sector
- ◯ Judiciary (judge, prosecutor…)
- ◯ Member of a Member State's general administration
- ◉ Other

Please provide your name, your authority or organisation's name and contact details

National administration

Please specify:

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Ministry of Security and Justice of the Netherlands, Migration Policy
Department/Law Enforcement Department.
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*2. DATA PROTECTION and PRIVACY

Please indicate your preference for the publication of your response on the Commission's website: Note that whatever option is chosen, your contribution may still be subject to requests for 'access to documents' under Regulation 1049/2001.

- (selected) Under the above given name: I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication
- Anonymously: I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication
- Not at all — please keep my contribution confidential (it will not be published, nor will in principle its content be taken into account, but it may be used internally within the Commission for statistical and analytical purposes).

*3.The answers you will provide are expected to refer to a specific Member State or to the EU as a whole. Please, select the option that best fits your case:

- EU as a whole
- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- (selected) The Netherlands
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
-

Spain
- ○ Sweden
- ○ United Kingdom

4. Which of the following areas of migration policy and law fall within your field of activity or interest? (Multiple answers are possible)

- [x] Migrant smuggling
- [ ] Return Policy
- [ ] Migration and human rights
- [ ] Asylum law
- [ ] International migration law
- [ ] Law of the sea
- [ ] International public law
- [ ] External dimension of EU migration policy
- [ ] Migration and security
- [ ] Information, research, monitoring and evaluation activities
- [ ] Other (please specify)

5.Did you take part in any activity related to the selected policy area(s) in the period 2013-2016?

- ◉ Yes
- ○ No

If YES, please select one or more options below:

- [x] In the definition of irregular migration-related policies and/or legislation;
- [x] In the implementation of irregular migration-related policies and/or legislation
- [ ] In the monitoring of irregular migration-related policies and/or legislation
- [ ] In the evaluation of irregular migration-related policies and/or legislation

* 6. In your view, are the provisions of the current EU legislation on migrant smuggling (Directive 2002/90/EC and Framework Decision 2002/946/JHA) adequate to meet the objectives of reducing irregular migration and preventing and repressing the crime of migrant smuggling?

- ◉ Yes
- ○ No

* 7. In your view, what are the main issues affecting the proper functioning of the EU legislation on migrant smuggling, if any? (Multiple answers are possible)

- [ ] A too narrow definition of the offence
- [ ] Inconsistent application of penalties across the EU
- [ ] A too low level of penalties
- [ ] Insufficient protection of those providing humanitarian assistance
- [ ] Insufficient protection of the human rights of those who are smuggled
- [ ] Insufficient protection of smuggled migrants willing to cooperate with the competent authorities
- [x] Insufficient exchange of information between Member States
- [x] Issues concerning jurisdiction
- [ ] Issues concerning extradition
- [ ]

Inconsistencies with international law
- [ ] Inconsistencies with other EU law
- [x] Insufficient operational cooperation between Member States
- [x] Insufficient cooperation through joint investigation teams
- [x] Insufficient cooperation between Member States and third countries
- [x] Insufficient cooperation with/among EU Agencies
- [ ] Insufficient enforcement in the Member States
- [ ] Other

Please elaborate

The NL is of the opinion that operational cooperation, including through joint investigation teams should be enhanced. In this context the coordination role of Europol and Eurojust should be strengthned, in particular by sharing reliable and updated information and intelligence on migrant smuggling.
At national level, some operational experts would like to see a change in legislation in terms of extending the jurisdiction for migrant smuggling. This has not been fully discussed yet. The discussion at the EU level could feed into the discussion at national level, taking into account of the administrative burden, success rate etc. Recently, the jurisdiction of trafficking in human beings has been expanded as a result of the implementation of Directive 2011/36/EU. Memorandum of explanation: “Where in other international legal instruments, the establishment of jurisdiction for trafficking committed outside the country could still be subject to certain conditions, the directive obliges to establish unconditional jurisdiction over trafficking committed by nationals (Article 10).” In this context the possibilities for a similar procedure for migrant smuggling could be further assess.

8. In your view, is the definition of the offence of facilitation of unauthorised entry, transit and residence (Art. 1 of Directive 2002/90/EC) sufficiently clear and adequate to meet the objectives of these instruments?

- (●) Yes
- ( ) No

If not, how should this definition be changed in your opinion?

9. Currently under EU law, facilitation of unauthorised entry or transit is criminalised even if it has not been committed for financial gain, whereas facilitation of unauthorised residence is only criminalised when committed for financial gain (Art. 1(1) of Directive 2002/90/EC). Differently, under the UN Protocol against the Smuggling of Migrants by Land, Air and Sea both facilitation of irregular entry and residence are criminalised only when committed for financial or material gain.
In your view, should facilitation of unauthorised entry or transit only be criminalised when committed for financial gain, as it is already the case for the facilitation of unauthorised residence?

- [ ] Yes
- [x] No

Please elaborate

The NL is of the opinion that the element of financial or other material benefit should not be included in trans border smuggling cases because this will complicate the investigations on migrant smuggling.

10. Currently under EU law, Member States can choose not to impose sanctions on those who facilitate unauthorised entry or transit with the aim of providing humanitarian assistance (Art. 1(2) of Directive 2002/90/EC). Should EU law make it obligatory not to sanction those that facilitate unauthorised entry or transit for humanitarian reasons?

- [ ] Yes
- [x] No

Please elaborate

There is no need to change EU legislation relating to the humanitarian clause. Such a clause would lead to difficulties in evidence gathering. The Dutch legislation offers enough possibilities to not sanction in cases of humanitarian assistance (such as verdict of guilt without any kind of punishment).

11.In your view, are the level of penalties for natural and legal persons currently foreseen by Framework Decision 2002/946/JHA adequate to meet the objective of preventing and repressing the crime of migrant smuggling?

- [ ] Yes
- [x] No

Please elaborate

Raising the minimum level of maximum penalties at EU level will be more dissuasive and effective in tackling migrant smuglling because of the deterrent effect.

If the level of penalties is not adequate (too low or too high), please explain how it should be modified.

12. Under Art. 1 of Framework Decision 2002/946/JHA, in certain aggravating circumstances - when committed for financial gain and either as an activity of a criminal organisation or while endangering the lives of the smuggled migrants, Member States should ensure that smuggling is punishable by a maximum custodial sentence of no less than eight years. Do you think that this level of penalties under these aggravating circumstances is effective and adequate to tackle this crime?

- (●) Yes
- ( ) No

Please elaborate

see answer 11.

13. Do you think that additional aggravating circumstances should be added?

- ( ) Yes
- (●) No

Please elaborate

14. In your view, should criminalisation of conduct related to migrant smuggling, such as producing, procuring, or possessing a fraudulent travel or identity document for the purpose of enabling unlawful entry, transit or stay, be explicitly criminalised under EU law?

- ( ) Yes
- (●) No

Please elaborate

because of the interference of criminal and administrative law. It could complicate criminal procedures. In the Netherlands, there are many good examples of using combined civil, financial and criminal laws in cases that could be approached in a variety of legal ways.

15. Do you think that a wider array of accompanying sanctions (such as for instance entry bans for

migrant smugglers, seizure of the vehicles used for smuggling purposes, or confiscation of driving licences for smugglers) should be added under the current EU legislation against migrant smuggling?

- ○ Yes
- ◉ No

Please elaborate

see also answer 14.

16. In your view, should the current EU legislation on migrant smuggling contain explicit provisions on the freezing and confiscation of migrant smugglers' assets, in line with applicable EU law?

- ◉ Yes
- ○ No

Please elaborate

A general provision on the freezing and confiscation of migrant smugglers's assets is preferable. Consider in conjunction with EU-directive 2014/42 EU on the freezing and confiscation on proceeds of crime.

17. In your view, is the current EU legal framework on migrant smuggling adequately protecting the rights of smuggled migrants?

- ◉ Yes
- ○ No

Please elaborate

18. In addition to a revision of the legislation, how else could the EU step up the prevention and countering of migrant smuggling? (multiple answers are possible)

- ☑ Guidelines for the application of EU legal framework
- ☐ Financial support
- ☑ Capacity building and other types of support for Member States' cooperation (targeted training courses, peer-to-peer tuition projects…)
- ☑ Handbooks for operators in the transport sector
- ☐ Others

New Section

Contact

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